RECORD AND BRIEF.

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No. 16-534

In the Supreme Court of the United States

JENNY RUBIN, *et al.*,
Petitioners,

v.

ISLAMIC REPUBLIC OF IRAN, *et al.*,
Respondents.

On Writ of Certiorari to the
United States Court of Appeals for the Seventh Circuit

BRIEF FOR RESPONDENT THE UNIVERSITY OF CHICAGO

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QUESTION PRESENTED

The Foreign Sovereign Immunities Act (FSIA) provides foreign states with a jurisdictional immunity against civil actions and a separate execution immunity that protects foreign states' property from execution upon a judgment. Section 1605A of the FSIA abrogates the jurisdictional immunity for certain claims based on terrorist acts in which a foreign state was complicit.

Petitioners seek to enforce a judgment entered pursuant to Section 1605A by executing on the Persepolis Collection, a set of ancient artifacts that are the property of the Islamic Republic of Iran but are in the possession of a museum that is part of the University of Chicago.

The question presented is whether Section 1610(g) of the FSIA abrogates the execution immunity in all cases in which a party seeks to enforce a judgment entered pursuant to Section 1605A, notwithstanding other provisions of the FSIA that provide for a more limited abrogation of execution immunity in such cases.

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INTRODUCTORY STATEMENT

Petitioners in this case seek to execute a judgment against respondent Iran by seizing the Persepolis Collection, Persian artifacts that are the property of Iran but that have been in the possession of the Oriental Institute at the University of Chicago for eighty years. Petitioners assert that Section 1610(g) of the Foreign Sovereign Immunities Act abrogates sovereign immunity and thereby permits petitioners to seize these artifacts. The University maintains that Section 1610(g) has no such effect.

Petitioners obtained their judgment on the basis of injuries inflicted on them by a terrorist attack in which Iran was complicit. Petitioners, and the amici curiae supporting them, emphasize the importance of combatting terrorism, of depriving terrorist organizations and their state sponsors of funds, and of compensating the victims of terrorism. The University of course acknowledges the great importance of these interests. But as the Foreign Sovereign Immunities Act recognizes, there are important and independent countervailing interests as well. Congress took these competing interests into account when it enacted the FSIA.

In this case, Iran long ago entrusted the Persepolis Collection, which dates from approximately 500 B.C.E., to the University for study and publication. The Collection is part of the cultural patrimony not just of Persia and Iran but of humankind. The University supports the claim of sovereign immunity in this case so that it may continue to carry out its core missions of research and teaching, and so that it may maintain ties to individuals and institutions in other nations who

share the University's commitment to the advancement of human knowledge.

STATEMENT

1. The Foreign Sovereign Immunities Act

a. The distinction between commercial and noncommercial activity

The Foreign Sovereign Immunities Act of 1976 (FSIA), 28 U.S.C. §§ 1330, 1602 *et seq.*, codifies the "legal standards governing claims of immunity in every civil action against a foreign state or its political subdivisions, agencies, or instrumentalities." *Verlinden B.V. v. Central Bank of Nigeria,* 461 U.S. 480, 488 (1983). The Court has, on several occasions, described the background of the FSIA. See, *e.g.,* id. at 486-89. In *The Schooner Exchange v. McFaddon,* 11 U.S. (7 Cranch) 116 (1812), the Court, in an opinion by Chief Justice Marshall, ruled that United States courts would not assert jurisdiction over "'a national armed vessel * * * of the emperor of France.'" Id. at 146-47, quoted in *Republic of Austria v. Altmann*, 541 U.S. 677, 688-89 (2004). Although Chief Justice Marshall "noted * * * that the outcome might well be different if the case involved a sovereign's *private* property" (*Altmann*, 541 U.S. at 689 n. 10; emphasis in original), *The Schooner Exchange* "came to be regarded as extending virtually absolute immunity to foreign sovereigns." *Verlinden*, 461 U.S. at 486. Until the middle of the twentieth century, U.S. courts generally deferred to the State Department in determining whether to allow foreign states and their instrumentalities to be sued, and the State Department "ordinarily requested

immunity in all actions against friendly foreign sovereigns." Ibid.

In 1952, in a document known as the Tate Letter, the State Department announced a change in its policy. The Tate Letter adopted the "restrictive" theory of foreign sovereign immunity. Under that theory, "the immunity of the sovereign is recognized with regard to sovereign or public acts (*jure imperii*) of a state, but not with respect to private acts (*jure gestionis*)." See *Alfred Dunhill of London, Inc., v. Republic of Cuba*, 425 U.S. 682, 711 (1976) (Appendix 2 to Opinion of the Court) (reproducing the Tate Letter). The FSIA, "[f]or the most part, * * * codifies, as a matter of federal law, the restrictive theory of sovereign immunity." *Verlinden*, 461 U.S. at 488; see also *Republic of Argentina v. Weltover, Inc.*, 504 U.S. 607, 612 (1992).

In particular, the distinction drawn by the Tate Letter and the restrictive theory—the distinction between public and private acts—is central to the FSIA. The FSIA translates that into a distinction between commercial activity and property, on the one hand, and noncommercial activity and property, on the other. Section 1602 of the FSIA, the statute's "Findings and declaration of purpose," states: "Under international law, states are not immune from the jurisdiction of foreign courts insofar as their commercial activities are concerned, and their commercial property may be levied upon for the satisfaction of judgments rendered against them in connection with their commercial activities." 28 U.S.C. § 1602. As the Court summarized this view (one that it described as providing "significant assistance in construing the scope of" the FSIA), the restrictive

theory "would not bar a suit based upon a foreign state's participation in the marketplace in the manner of a private citizen or a corporation." *Weltover*, 504 U.S. at 613-14.

b. The distinction between jurisdictional and execution immunity

The FSIA establishes two distinct immunities. Subject to certain exceptions, foreign states are "immune from the jurisdiction of the courts of the United States and of the States" (28 U.S.C. § 1604). This jurisdictional immunity bars suits against foreign states. But the FSIA also provides a separate execution immunity: even if a court has lawfully asserted jurisdiction over a foreign state and entered judgment against it, Section 1609 of the FSIA, 28 U.S.C. § 1609, specifies that "the property in the United States of a foreign state shall be immune from attachment arrest and execution except as provided" in Section 1610, 28 U.S.C. § 1610.[1]

The exceptions to the execution immunity "are narrower" than the exceptions to the jurisdictional immunity. *Republic of Argentina v. NML Capital, Ltd.*, 134 S. Ct. 2250, 2256 (2014). This is not surprising. However threatening to good relations among nations it might be to subject a foreign state to suit, seizing property belonging to a foreign state is bound to create even greater tensions. In fact, according to the House

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[1] Section 1609 also refers to Section 1611 of the FSIA, which provides that "[n]otwithstanding the provisions of section 1610" certain property of foreign states remains immune from attachment and execution. See 28 U.S.C. § 1611(a), (b), (c). The provisions of Section 1611 are not at issue here.

Report that accompanied the FSIA, even after the Tate Letter, when the restrictive view was official United States policy, the United States still recognized an absolute immunity against execution.[2]

Both sets of immunities in the FSIA, however, rely on the distinction between commercial and noncommercial activity that is central to the history of foreign sovereign immunity. For example, Section 1605(a)(2) of the FSIA abrogates the jurisdictional immunity of a foreign state "in any case * * * in which the action is based upon a commercial activity carried on in the United States by the foreign state" (28 U.S.C. § 1605(a)(2)). Section 1610(a)(2) abrogates the immunity from execution of "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States * * * if * * * the property is or was used for the commercial activity upon which the claim was based." 28 U.S.C. § 1610(a)(2).

2. The Proceedings Below

a. Petitioners are individuals who were injured by a terrorist attack carried out by Hamas in Jerusalem in 1997. Pet. App. 1-2. They sued respondent the Islamic Republic of Iran in the United States District Court for

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[2] See H.R. Rep. 94-1487, 94th Cong., 2nd Sess. 8, 27 (1976) (citations omitted): "Under existing law, a foreign state in our courts enjoys absolute immunity from execution, even in ordinary commercial litigation where commercial assets are available for the satisfaction of a judgment. * * * [T]he traditional view in the United States concerning execution has been that the property of foreign states is absolutely immune from execution. * * * Even after the 'Tate Letter' of 1952, this continued to be the position of the Department of State and of the courts."

the District of Columbia, alleging that Iran provided material support to the attackers. Id. at 2. Petitioners invoked an exception to jurisdictional immunity, now codified at 28 U.S.C. § 1605A, for damages actions against state sponsors of terrorism that provided material support for a terrorist attack.[3] The district court entered a default judgment for $71.5 million against Iran. Pet. App. 2.

Petitioners registered the judgment in the Northern District of Illinois and sought to attach and execute on the Persepolis Collection, a collection of Persian artifacts that are in the possession of respondent the University of Chicago. Pet. App. 6, 8.[4] Iran had lent the Persepolis Collection to the Oriental Institute at the University of Chicago in 1937 for research, translation, and cataloguing, and nearly all of the collection has remained in the possession of the Oriental Institute since then. See id. at 4-5, 46. The collection consists of approximately 30,000 clay tablets and fragments. Id. at 4-5. The tablets and fragments contain some of the oldest examples of human writing in the world. Id.

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[3] Petitioners initially invoked 28 U.S.C. § 1605(a)(7), which provided this exception to jurisdictional immunity when petitioners sued in 2003. Congress later repealed Section 1605(a)(7) and replaced it with 28 U.S.C. § 1605A, which codifies a similar immunity. Pet. App. 5-6. Petitioners converted their Section 1605(a)(7) judgment to a Section 1605A judgment. See Pet. App. 6 n.1, 15, 22.

[4] Petitioners initially tried to attach four collections of artifacts, but the court of appeals ruled that three of those collections were not subject to the attachment proceeding, either because they were outside the territorial jurisdiction of the district court or because they were not Iran's property. See Pet. App. 8-10. Petitioners have not challenged that ruling in this Court.

In order to overcome the execution immunity provided by 28 U.S.C. § 1609, petitioners first invoked Section 1610(a)(7), which provides that "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered in a court of the United States" if the judgment "relates to a claim for which the foreign state is not immune" under the terrorism exception now codified by Section 1605A. Petitioners also invoked Section 1610(g)(1), which, they asserted, is "an independent exception to execution immunity available to victims of state-sponsored terrorism." Pet. App. 7.

b. The district court granted respondents' motion for summary judgment. Pet. App. 71. The district court concluded that the Section 1610(a)(7) exception for "property * * * used for a commercial activity in the United States" applied only to property used by the foreign state itself for a commercial purpose. Pet. App. 50-57. Because Iran did not use the Persepolis Collection for a commercial purpose, the Section 1610(a)(7) exception did not apply to that property, and the property was immune from attachment and execution. See Pet. App. 57. The district court also rejected petitioners' argument that Section 1610(g)(1) is an independent exception to execution immunity. Id. at 60-62.

c. The United States Court of Appeals for the Seventh Circuit affirmed. Pet. App. 1-38. The court of appeals, like the district court, rejected petitioners' argument that the "commercial activity" exception in

Section 1610(a)(7) applied to the Persepolis Collection.[5] This Court declined to review that holding by the court of appeals. See Pet. ii; *Rubin v. Iran*, No. 16-534 (June 27, 2017) (certiorari granted limited to Question 1).

The Seventh Circuit then rejected petitioners' argument that Section 1610(g)(1) provided an independent exception to execution immunity in terrorism cases. Section 1610(g)(1) provides in part:

> (1) * * * [T]he property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity, is subject to attachment in aid of execution, and execution, upon that judgment as provided in this section, regardless of—
>
> (A) the level of economic control over the property by the government of the foreign state;
>
> (B) whether the profits of the property go to that government;

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[5] The court of appeals said it was "skeptical that academic study qualifies as a commercial use" but that it would "put that question aside" because "§ 1610(a) applies only when *the foreign state itself* has used its property for a commercial activity in the United States." Pet. App. 16, 20 (emphasis in original). The court noted that petitioners did not contend that Iran had used the Persepolis Collection for a commercial activity in the United States. Id. at 20-21.

> (C) the degree to which officials of that government manage the property or otherwise control its daily affairs;
>
> (D) whether that government is the sole beneficiary in interest of the property; or
>
> (E) whether establishing the property as a separate entity would entitle the foreign state to benefits in United States courts while avoiding its obligations.

The court of appeals explained (Pet. App. 4, 22-26) that this provision was a response to this Court's decision in *First National City Bank v. Banco Para El Comercio Exterior de Cuba ("Bancec")*, 462 U.S. 611 (1983). *Bancec* ruled that "government instrumentalities established as juridical entities distinct and independent from their sovereign normally should be treated as such." Id. at 626-27. This presumption could, however, "be overcome in certain circumstances." Id. at 628. In *Bancec* itself, the Court held that the juridically separate status of the government instrumentality involved in that case could be disregarded. Id. at 630-33. But the *Bancec* Court "announce[d] no mechanical formula for determining the circumstances under which the normally separate juridical status of a government instrumentality is to be disregarded." Id. at 633.

The Seventh Circuit noted that in the wake of this Court's decision in *Bancec*, courts of appeals "began to coalesce around a set of five factors for determining when the exceptions" to the *Bancec* rule applied. Pet. App. 23, citing *Flatow v. Islamic Republic of Iran*, 308 F. 3d 1065, 1071 n.9 (9th Cir. 2002), and *Walter Fuller*

Aircraft Sales, Inc., v. Republic of Philippines, 965 F.2d 1375, 1380-82 & n.7 (5th Cir. 1992). The Seventh Circuit then showed that the five subsections of Section 1610(g)(1) corresponded closely to the five factors that the lower courts developed. See Pet. App. 25-26. The court concluded that "Congress drafted subsection (g) to abrogate the *Bancec* doctrine for terrorism-related judgments." Id. at 26.

The court of appeals rejected petitioners' contention that Section 1610(g)(1) went further and abrogated execution immunity entirely for such judgments. The court noted that Section 1610(g)(1) made property "subject to attachment in aid of execution, and execution * * * *as provided in this section*" (28 U.S.C. § 1610(g)(1) (emphasis added); see Pet. App. 27). The italicized phrase dictated that petitioners had to come within one of the other exceptions in Section 1610, such as Section 1610(a)(7), in order to execute upon Iran's property. Section 1610(g)(1) established that *if* petitioners came within another provision in Section 1610, *Bancec* would not be a barrier to executing upon the property of an instrumentality of Iran. But petitioners' construction of Section 1610(g)(1) effectively read the italicized phrase out of the statute entirely. See Pet. App. 27, 35.

In addition, the court of appeals noted that Section 1610 contains two other exceptions to execution immunity for terrorism-related judgments, both of which are limited to commercial activity: Section 1610(a)(7), which applies to property of a foreign state used for commercial activity in the United States; and Section 1610(b)(3), which applies to the property of an agency or instrumentality of a foreign state engaged in

commercial activity in the United States. See Pet. App. 27-28, citing 28 U.S.C. §§ 1610(a)(7), 1610(b)(3). The court of appeals pointed out that petitioners' interpretation of Section 1610(g) would make those provisions superfluous. See Pet. App. 27-28. In any event, the court of appeals reasoned, the recitation of the five *Bancec*-related factors in Section 1610(g)(1) was evidence that that provision was "a corrective measure * * * plainly aimed at eliminating the *Bancec* barrier" rather than "creating a new and independent exception to execution immunity for all terrorism-related judgments." Pet. App. 26.[6]

SUMMARY OF ARGUMENT

A. The execution immunity provided in the FSIA prohibits petitioners from seizing the Persepolis Collection. Section 1610(a)(7) of the FSIA gives parties like petitioners who hold terrorism-based judgments a clearer path than other judgment creditors have to overcoming a foreign state's execution immunity. But Section 1610(a)(7) still requires a showing that the foreign state's property is "used for a commercial activity in the United States." Petitioners have not made, and cannot make, that showing about the Persepolis Collection.

Petitioners instead invoke Section 1610(g)(1) of the FSIA. That provision does not abrogate sovereign immunity. It is undisputed that Section 1610(g)(1)

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[6] The court of appeals denied rehearing en banc. Judge Hamilton, who was not on the panel, filed a dissent from the denial. Pet. App. 39-42. He noted that a majority of the active judges on the court were recused; as a result, he said, "it is impossible to hear this case en banc." Id. at 39; see also id. at 35 n.6.

removes the *Bancec* limits that might prevent a party holding a terrorism-based judgment against a foreign state from executing upon assets held by an agency or instrumentality of that state. But Section 1610(g)(1) says nothing about sovereign immunity, and it is implausible to suppose that Congress would have abrogated execution immunity in such a casual fashion in a provision dealing with an entirely different issue.

Beyond that, there is overwhelming evidence in the text of Section 1610(g)(1), and in the relationship between that provision and the rest of the FSIA, that Section 1610(g)(1) does not do what petitioners say. Section 1610(g)(1) specifies that property is subject to attachment and execution "as provided in this section." If petitioners' interpretation were correct, that phrase would be entirely superfluous. In fact, the plain meaning of "as provided in this section" is that property is subject to attachment and execution only as provided in Section 1610—the "section" of which (g)(1) is a subsection. And none of the exceptions to execution immunity in Section 1610 allows petitioners to seize the Persepolis Collection.

The contrast between text of Section 1610(g)(1) and other provisions of Section 1610 further demonstrates that Section 1610(g)(1) does not abrogate sovereign immunity. Section 1609 provides that foreign states' property "shall be immune" from attachment and execution except as provided in Section 1610; each of the provisions of Section 1610 that abrogates immunity then provides, in terms, that certain property "shall not be immune" (or otherwise says that Section 1609 shall not apply). Section 1610(g)(1) contains no such language. In fact, petitioners' interpretation of Section

1610(g)(1) would nullify a deliberate decision that Congress made in the very statute that enacted Section 1610(g)(1): at the same time it enacted Section 1610(g)(1), Congress specified that holders of terrorism-based judgments, like petitioners, are subject to Section 1610(a)(7), with its "commercial activity" limitation, when they seek to execute upon such a judgment.

Petitioners' interpretation of Section 1610(g)(1) also makes most of that provision itself otiose. And their interpretation violates the canon of *expressio unius est exclusio alterius*.

B. Petitioners have no plausible responses to these problems with their interpretation of Section 1610(g)(1). Petitioners (or their supporting amici) suggest that the phrase "as provided in this section" refers to subsection (f)(1) of Section 1610 or to procedural protections in Section 1610. Among other problems with those accounts, the phrase simply does not say either of those things. Petitioners also suggest that the "section" is a section of the Public Law that enacted Section 1610(g)(1), but that statute specifically directed that subsection (g) be added to "Section 1610 of Title 10"—removing any doubt about what "section" Congress had in mind.

Petitioners' response to the point that their reading of Section 1610(g)(1) would make Section 1610(a)(7) superfluous attributes irrational decisions to Congress: if petitioners are correct, Congress amended Section 1610(a)(7) in a way that made it completely pointless at precisely the time that Congress was enacting Section 1610(g)(1). Finally, petitioners say that their view is supported by Congress's decision to include a reference to "the property of a foreign state" in Section

1610(g)(1). But Congress had several reasons to include that language; none has any relationship to sovereign immunity.

C. Petitioners' claim is also inconsistent with fundamental principles of foreign sovereign immunity. Petitioners' interpretation of Section 1610(g)(1) would allow them to seize the noncommercial property of foreign states, like the Persepolis Collection. But especially in connection with execution immunity--the more sensitive aspect of foreign sovereign immunity--the distinction between commercial activity and property, on the one hand, and noncommercial activity and property, on the other, is foundational. That distinction is emphasized in the FSIA itself; in this Court's decisions; in the State Department's statements; in the United Nations convention on the subject; and in a decision of the International Court of Justice. Congress of course has the power to override that distinction, but the Court should not assume that Congress has done so unless there is clear evidence that Congress did. Here the opposite is true: the evidence is overwhelming that Congress intended no such abrogation of sovereign immunity.

ARGUMENT

PETITIONERS MAY NOT EXECUTE THEIR JUDGMENT BY SEIZING THE PERSEPOLIS COLLECTION

A. The Text And Structure Of The Foreign Sovereign Immunities Act Demonstrate That Section 1610(g) Does Not Abrogate The Sovereign Immunity That Attaches To The Persepolis Collection

1. Section 1609 of the Foreign Sovereign Immunities Act, 28 U.S.C. § 1609, provides that the property of a foreign state in the United States "shall be immune from attachment arrest and execution" unless that immunity has been abrogated by Section 1610 of the FSIA, 28 U.S.C. § 1610. The Persepolis Collection in the Oriental Institute Museum of the University of Chicago is a collection of ancient Persian artifacts that are the property of a foreign state—Iran—although the Collection has been on loan to the University for many decades. The FSIA therefore bars petitioners from seizing the Persepolis Collection unless they can identify a provision in Section 1610 that abrogates sovereign immunity with respect to the artifacts.

Section 1610(a) of the FSIA describes the kind of foreign state property as to which the immunity from execution has been abrogated.[7] Specifically, Section

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[7] Other subsections of Section 1610 also address the execution immunity of foreign state property, but those provisions do not apply to the Persepolis Collection. See 28 U.S.C. § 1610(b) (dealing with the property of agencies or instrumentalities of foreign states); 28 U.S.C. § 1610(e) (the vessels of foreign states); 28 U.S.C. § 1610(f) (certain assets seized or frozen by the United States government; see pp. 28-29, *infra*).

1610(a) provides that "[t]he property in the United States of a foreign state * * * used for a commercial activity in the United States, shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States * * * if" certain other conditions apply. 28 U.S.C. § 1610(a). The subsections of Section 1610(a) then specify the circumstances in which property satisfying that description—"used for a commercial activity in the United States"— may be seized to satisfy a judgment. For example, Subsection (1) of Section 1610(a) provides that such property may be seized if the foreign state has waived its immunity from execution. See 28 U.S.C. § 1610(a)(1). Subsection (2) of Section 1610(a) provides that such property may be seized if "the property is or was used for the commercial activity upon which the claim is based." 28 U.S.C. § 1610(a)(2).

Petitioners' judgment against Iran is based on Iran's complicity in a terrorist attack. As a result, petitioners have a clearer path to overcoming the execution immunity than other judgment creditors have. Petitioners are entitled to invoke Subsection (7) of Section 1610(a), 28 U.S.C. §1610(a)(7). Congress added Section 1610(a)(7) to expand the remedies available to individuals, like petitioners, who have obtained judgments related to terrorism. See Antiterrorism and Effective Death Penalty Act, Pub. L. No. 104-132, §221(b)(1), 110 Stat. 1214, 1243 (1996).

Subsection (7), read together with the rest of Section 1610(a), provides:

> The property in the United States of a foreign state * * * used for a commercial activity in the United States, shall not be immune from

> attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States * * * if * * * the judgment relates to a claim for which the foreign state is not immune under section 1605A or section 1605(a)(7) * * * regardless of whether the property is or was involved with the act upon which the claim is based.

28 U.S.C. § 1610(a)(7). Sections 1605A and 1605(a)(7), which Section 1610(a)(7) refers to, were also added to the FSIA by Congress in order to enable victims of state-sponsored terrorism to obtain relief from the responsible foreign states. Those provisions abrogated jurisdictional sovereign immunity for certain terrorism-related actions. See Pub. L. No. 104-132, §221(a), 110 Stat. 1214, 1241 (1996); National Defense Authorization Act for Fiscal Year 2008, Pub. L. No. 110-181, § 1083(a), 122 Stat. 3, 338. Section 1605A is the basis of petitioners' judgment. See page 6 note 3, *supra*.

Because their judgment is based on a terrorism-related claim that allows them to invoke Subsection (7), petitioners need not show, for example, that the property they seek to seize was involved in any way with the acts that gave rise to their claim. They also do not have to fit within any of the limits imposed by other subsections of Section 1610(a). They must still show, however, that that property was "used for a commercial activity in the United States."

In the courts below, petitioners contended that the artifacts in the Persepolis collection were, in fact, "used for a commercial activity." Both the district court and the court of appeals rejected that argument. The

petition for a writ of certiorari sought review of that issue, but the Court's order granting certiorari excluded that question. Petitioners may seize property of Iran in the United States that is used for a commercial activity in the United States. But as this case comes to the Court, it is settled that Section 1610(a) does not abrogate the immunity that applies to the Persepolis collection.

2. Petitioners of course recognize, as they must, that they cannot seize the Persepolis collection unless they identify a provision of the FSIA that abrogates the execution immunity that applies to that property. Petitioners assert that Section 1610(g)(1) is such a provision. Their position is implausible for many reasons.

a. To begin with, as the courts below ruled, and as petitioners acknowledge, Section 1610(g)(1) has an obvious purpose that does not involve property like the Persepolis collection in any way. In *Bancec,* this Court determined that "normally" an instrumentality of a foreign state that is established as a "distinct and independent" juridical entity "should be treated as such," although that presumption can be overcome. 462 U.S. at 626-28. As the court below noted, lower courts have identified various factors that would allow the *Bancec* presumption to be overcome. Section 1610(g)(1) lists those factors in subsections (A) through (E) and declares that those factors are irrelevant when a Section 1605A judgment has been entered against a foreign state. For example, under Section 1610(g)(1), the property of "an agency or instrumentality of" that state, whether or not that agency or instrumentality is "a separate juridical entity," is "subject to attachment

in aid of execution, and execution * * * as provided in this section, regardless of" whether the *Bancec* factors are present.

The *Bancec* factors, as we explain below, do not derive from principles of sovereign immunity. Thus the most obvious purpose of Section 1610(g)(1) has nothing to do with sovereign immunity at all. But petitioners contend that Section 1610(g)(1) is a dual-purpose provision. They say that, in addition to straightforwardly overriding the *Bancec* presumption, Section 1610(g)(1) also, *en passant*, abrogates the execution immunity for foreign state property in all terrorism-related cases. In that way, according to petitioners, Section 1610(g)(1) simply renders inoperative the Section 1610(a)(7) limitation—that only property used for a commercial activity in the United States loses execution immunity, even when a terrorism-related judgment is being enforced.

On its face this claim about Section 1610(g)(1) is implausible, even apart from many other problems that petitioners' interpretation encounters. Congress established, in Section 1609, the overarching rule that a foreign state's property is immune from execution in the absence of an exception. According to petitioners, Congress then created such an exception, without saying so explicitly, in a statute whose obvious and primary purpose was something quite different. Execution immunity is, as we have noted, the most sensitive aspect of foreign sovereign immunity. It is implausible to suppose that Congress would abrogate execution immunity in such a backhanded way.

b. That is, however, only the beginning of the problems that petitioners' interpretation of Section

1610(g)(1) faces. Perhaps the most obvious refutation of petitioners' position is in the language of the provision itself: Section 1610(g)(1) specifies that property is subject to attachment and execution "as provided in this section." Petitioners treat that phrase as unwanted surplusage. Petitioners and their supporting amici come up with various explanations of why that phrase is not fatal to their view of Section 1610(g)(1); we will address those explanations below. But petitioners never explain why, if their reading of Section 1610(g)(1) is correct, Congress included that phrase in the statute in the first place. If petitioners are correct, that phrase could be omitted without changing the effect of Section 1610(g)(1) at all. "[O]ne of the most basic interpretive canons [is] that [a] statute should be construed so that effect is given to all its provisions, so that no part will be inoperative or superfluous, void or insignificant" (*Corley v. United States*, 556 U.S. 303, 314 (2009) (internal quotation marks and citations omitted)).

If the phrase "as provided in this section" is assigned its plain meaning, it becomes clear that petitioners' interpretation of Section 1610(g)(1) is wrong. "[T]his section" is, of course, Section 1610; that is the "section" in which subsection (g)(1) is located. Section 1610 contains the provisions abrogating execution immunity. The most natural reading of Section 1610(g)(1), therefore, is that a party seeking to execute upon the property described in Section 1610(g)(1) must identify some other part of "this section"—Section 1610—that abrogates sovereign immunity and allows that property to be seized. Unless petitioners can show that they are acting "as provided in" Section 1610, they cannot take advantage of Section

1610(g)(1). Petitioners (see, *e.g.*, Pet. Br. i, 25) refer to Section 1610(g) as a "freestanding" abrogation of sovereign immunity. But the phrase "as provided in this section" shows that Section 1610(g)(1) is precisely *not* a "freestanding" provision. It is a provision that specifically links its applicability to other parts of Section 1610. Section 1610(g)(1) makes the property specified in that provision subject to attachment and execution only when other parts of Section 1610 have abrogated sovereign immunity as to that property.

When Congress wishes to make a provision truly "freestanding," it knows how to do so. Indeed it has done so in other statutes having to do with the assets that are available to satisfy terrorism-related judgments. Section 201(a) of the Terrorism Risk Insurance Act of 2002 (TRIA), codified as a note following 28 U.S.C. § 1610, makes certain blocked assets—certain assets seized or frozen by the government under the Trading with the Enemy Act, 50 U.S.C. § 4305(b), or the International Emergency Economic Powers Act, 50 U.S.C. §§ 1701, 1702—subject to attachment and execution to satisfy a terrorism-based judgment. Section 1610(f)(1) of the FSIA, 28 U.S.C. § 1610(f)(1), although it has never taken effect (see pages 28-29, *infra*), is a similar provision. But both of those provisions, by their terms, apply "[n]otwithstanding any other provision of law." See Pub. L. 107–297, § 201(a); 28 U.S.C §1610(f)(1). That language at least presumptively overrides statutes providing sovereign immunity (see *Bank Markazi v. Peterson*, 136 S. Ct. 1310, 1318 n.2 (2016)), making an explicit abrogation of immunity unnecessary. But Section 1610(g)(1) contains no such language. On the contrary: the phrase "as provided in this section" in

Section 1610(g)(1) is the opposite of "notwithstanding any other provision of law." "[A]s provided in this section" explicitly limits the application of Section 1610(g)(1) by requiring that any attachment or execution comply with the other provisions of Section 1610.

c. There is other evidence, in the text and structure of the FSIA, that Section 1610(g)(1) is not an abrogation of sovereign immunity. That becomes clear, for example, if one compares the language of Section 1610(g)(1) with provisions of the FSIA that unquestionably do abrogate sovereign immunity. Section 1609 provides that "the property in the United States of a foreign state *shall be immune* from attachment arrest and execution except as provided in section[] 1610" (28 U.S.C. § 1609; emphasis added). Immunity-abrogating portions of Section 1610 then specify when certain property "shall not be immune." Section 1610(a) provides that foreign state property used for a commercial activity in the United States "shall not be immune" from attachment in aid of execution or execution, if one of the subsections of Section 1610(a) is satisfied. Section 1610(b) provides that property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States "shall not be immune" in certain circumstances. Section 1610(d) specifies when the property of a foreign state, used for a commercial activity in the United States, "shall not be immune" from prejudgment attachment. Section 1610(e) provides that foreign vessels "shall not be immune" from certain forms of attachment and execution.

Section 1610(g)(1) contains no reference to immunity.[8] In contrast to provisions of Section 1610 that abrogate sovereign immunity, Section 1610(g)(1) does not say that certain property "shall not be immune." Nor, of course, does it contain a phrase like "notwithstanding any other provision of law." Instead, Section 1610(g)(1) provides that certain property is "subject to attachment in aid of execution, and execution" and immediately adds "as provided in this section," where the "section" is Section 1610, which elsewhere contains explicit abrogations of immunity. In other words, Section 1610(g)(1) makes property subject to attachment and execution—but only if some other provision in Section 1610 has specified that that property "shall not be immune" or otherwise abrogates sovereign immunity. In petitioners' case, that other provision is Section 1610(a)(7), with its limitation to property used for a commercial activity in the United States.

The reason for Congress's choice of words—and the error of asserting that Section 1610(g)(1) abrogates execution immunity—becomes even clearer in light of what Section 1610(g)(1) undisputedly does. The *Bancec* presumption that Section 1610(g)(1) overrides is not a matter of sovereign immunity. The Court in *Bancec* was explicit on this point: the Court "conclud[ed] that the FSIA does not control the determination" of whether an instrumentality is liable for debts owed by a foreign state. See 462 U.S. at 621. Instead, the Court relied on "principles * * * common to both international law and federal common law" (id. at 623).

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[8] Section 1610(g)(2) refers to the sovereign immunity of the United States, but that provision is irrelevant here.

It follows that when Congress, in Section 1610(g)(1), decided to modify those principles for terrorism-based judgments, Congress did not have to create or expand any exceptions to sovereign immunity—and Section 1610(g)(1) does not do so. That is why Section 1610(g)(1) does not use the language of immunity and instead makes its operation contingent on an abrogation of immunity elsewhere in "this section." Far from being, as petitioners say, a "freestanding execution immunity provision" (e.g., Pet. Br. 48), Section 1610(g)(1) is, as its plain language demonstrates, neither freestanding nor an immunity provision.

d. There is yet another textual barrier to petitioners' interpretation of Section 1610(g)(1). As the court of appeals explained, petitioners' view would render Section 1610(a)(7) superfluous. See Pet. App. 27-28. Petitioners assert that Section 1610(g)(1) abrogates the execution immunity that applies to the property of a foreign state in any case in which a party seeks to execute a judgment based on Section 1605A. If petitioners are correct, then no party with such a judgment would ever resort to Section 1610(a)(7), which contains the commercial activity limitation. Section 1610(b)(3) would, if petitioners are correct, be superfluous for similar reasons.[9]

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[9] Section 1610(b)(3) provides that "[A]ny property in the United States of an agency or instrumentality of a foreign state engaged in commercial activity in the United States shall not be immune from attachment in aid of execution, or from execution, upon a judgment entered by a court of the United States or of a State * * * if * * * the judgment relates to a claim for which the agency or instrumentality is not immune by virtue of [28 U.S.C. §] 1605A * * * or [28 U.S.C. §] 1605(a)(7)." On petitioners' view, Section

The court of appeals was correct in saying that petitioners' interpretation of Section 1610(g)(1) makes other provisions of the FSIA superfluous, and petitioners' efforts to escape that conclusion are implausible, as we show below. See pp. 32-34, *infra*. But the court of appeals actually understated the problem with petitioners' position. Petitioners would not just create a redundancy in the statute; they would nullify a deliberate decision Congress made to limit an exception to execution immunity.

The history of Section 1610(g)(1) and Section 1605A demonstrates this point. The same statute that enacted Section 1610(g)(1) also enacted Section 1605A. That statute was Section 1083(a) of the National Defense Authorization Act for Fiscal Year 2008 (NDAA), Pub. L. No. 110-181, § 1083(a), 122 Stat. 3, 338. See Pet. Br. App. 36-51. Section 1605A replaced an earlier measure, 28 U.S.C. § 1605(a)(7), that also abrogated jurisdictional immunity for certain claims based on terrorist acts; Section 1605A provided more extensive remedies in such cases than Section 1605(a)(7) had.

The important point is that at the same time that the NDAA added Section 1610(g)(1) and replaced Section 1605(a)(7) with Section 1605A, the NDAA also amended Section 1610(a)(7) specifically to apply to judgments based on Section 1605A. See Pub. L. No. 110-181, §1083(b)(3)(A), 122 Stat. 341; Pet. Br. App. 44. In other words, when Congress enacted Section 1610(g)(1), to allow parties like petitioners with judgments based on Section 1605A to overcome *Bancec*,

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1610(g)(1) abrogates the execution immunity of instrumentalities, so a party holding a Section 1605A judgment would never have to resort to Section 1610(b)(3), with it commercial activity limitation.

Congress also deliberately decided that those parties—parties like petitioners— would be subject to the commercial activity limit of Section 1610(a)(7).

When Congress enacted Section 1605A, it could have provided an unlimited abrogation of execution immunity for judgments based on that provision. But Congress did not do so. Instead, it decided to place Section 1605A judgments into the existing structure of execution immunity by applying the commercial activity limit to those judgments—and it did that at the same time it enacted Section 1610(g)(1). Petitioners would sweep aside this decision by Congress: they would read Section 1610(g)(1) to do, with respect to execution immunity from Section 1605A judgments, the opposite of what Congress did at the very same time that it enacted Section 1610(g)(1). Perhaps from the point of view of a party seeking to execute a Section 1605A judgment, petitioners' interpretation of Section 1610(g)(1) would make Section 1610(a)(7) superfluous, which is problematic enough. But from the point of view of Congress's interest in maintaining an appropriate system of sovereign immunity, what is at stake is something more important: not redundancy but whether Congress's decisions about sovereign immunity will be nullified.

e. There are still other ways in which petitioners' position cannot be reconciled with the text of Section 1610(g)(1). For example, on petitioners' account, nearly all of Section 1610(g)(1) itself is otiose. Section 1610(g)(1) could have ended after the words "subject to attachment in aid of execution, and execution, upon that judgment"—omitting the phrase "as provided in this section," and omitting all of the factors that

Congress used to override the *Bancec* presumption. That truncated version of Section 1610(g)(1) would have supported petitioners' position more strongly than the actual statute does. It is certainly an odd reading of a statute that would ignore the bulk of its operative provisions.

Alternatively, if Congress had wanted to do what petitioners claim, Congress could have added another paragraph to the list of factors that are irrelevant to whether a foreign state's property may be subject to execution. Congress could, for example, have said that a foreign state's property is subject to execution "regardless of * * * whether it is used for commercial activity." But Congress did not add any such provision to the list that followed "regardless of –". Under the maxim *expressio unius est exclusio alterius,* Congress's failure to do so is further evidence, if any is needed, that Section 1610(g)(1) was not intended to override the limits on execution immunity imposed by the rest of the FSIA.

B. Petitioners Give No Plausible Account Of Section 1610(g) That Supports Their Contrary View

Petitioners offer a variety of responses to the textual problems with their position, but none is plausible.

1. In dealing with the phrase "as provided in this section," petitioners, and their supporting amici, seem to suggest three explanations. The first echoes what the Ninth Circuit said in *Bennett v. Islamic Republic of Iran*, 825 F.3d 949 (9th Cir. 2016), cert. pending, No. 16-334. A Ninth Circuit panel in that case adopted petitioners' view of Section 1610(g)(1). The panel explained away the "as provided for" limitation by saying that it refers "to procedures contained in §1610(f)" (825 F. 3d at 959). Petitioners endorse the Ninth Circuit's explanation. See Pet. Br. 44-45.

There are any number of problems with this explanation. The first, of course, is that the language in Section 1610(g)(1) is "as provided in this section," not "as provided in subsection (f) of this section." The Ninth Circuit's (and petitioners') interpretation is therefore both inconsistent with the language and arbitrary—why subsection (f), as opposed to some other part of Section 1610?

Beyond that, as the Seventh Circuit explained in the opinion below, Subsection (f) "*never became operative*." Pet. App. 33 (emphasis in original). Subsection (f)(1) provides for execution upon certain blocked assets. 28 U.S.C. § 1610(f)(1). When Congress enacted that provision, it authorized the President to "waive [the provision] * * * in the interest of national

security," which President Clinton immediately did.[10] As the Seventh Circuit said "subsection (f), being inoperative from the start, does not allow *any* form of execution," so if the Section 1610(g)(1) phrase "as provided in this section" means "as provided in subsection (f)," then Section 1610(g)(1) "would [allow for] no execution at all" (Pet. App. 34; emphasis in original).

The second explanation, offered by petitioners alone (see Pet. Br. 45-49), is that "this section" refers not to a section of the U.S. Code, but to the Section 1083 of the NDAA—the statute that enacted Section 1610(g)(1) (along with, as we noted, Section 1605A, and various other provisions; see p. 25, *supra*). But the NDAA explicitly provided that "Section 1610 of title 28, United States Code, is amended" by "adding at the end" the provision denominated "(g)." Pub. L. No. 110-181,

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[10] As the Seventh Circuit explained (Pet. App. 33-34):

> Congress originally authorized the President to waive subsection (f)'s provisions "in the interest of national security." [Omnibus Consolidated and Emergency Supplemental Appropriations Act of 1999, Pub. L. No. 105-277,] § 117(d), 112 Stat. at 2681-[]92. President Clinton immediately issued a blanket waiver. Presidential Determination No. 99-1, 63 Fed. Reg. 59,201 (Oct. 21, 1998). Congress briefly repealed the President's waiver authority in the Victims of Trafficking and Violence Protection Act of 2000, Pub. L. No. 106-386, § 2002(f)(2), 114 Stat. 1464, 1541, 1543, but quickly restored it, *id.* § 2002(f)(1)(B), 114 Stat. at 1543, codifying the Executive's waiver authority in 28 U.S.C. § 1610(f)(3): "The President may waive any provision of paragraph (1) in the interest of national security." President Clinton issued another blanket waiver that same day. Presidential Determination No. 2001- 03, 65 Fed. Reg. 66,483 (Oct. 28, 2000).

§ 1083(b)(3), 3(D), 122 Stat. 3, 341 (2008); see Pet. Br. App. 44. When Congress included a reference to "this section" in a provision it was specifically adding to "Section 1610 of title 28, United States Code" Congress—of course—meant "this section" to refer to Section 1610 of title 28.

Petitioners themselves inadvertently provide evidence that Congress did not make the extraordinary blunder of overlooking the fact that it was adding subsection (g) to an existing U.S. Code section. Petitioners cite an earlier, proposed version of the NDAA in which Section 1610(g)(1) contained the phrase "a judgment entered under this section" at the place where the final version says "a judgment entered under Section 1605A." See Pet. Br. 46; Pet. Br. App. 57. As we have said, Section 1605A was enacted as part of the NDAA, along with Section 1610(g)(1). So that reference to Section 1605A in the proposed NDAA did in fact use "this section" to refer to a section of the NDAA. But as petitioners themselves say, Congress spotted the error and changed the language—a clear sign, if any is needed, that the reference to "this section" in the final version of Section 1610(g)(1) did not, contrary to petitioners' quite implausible view, refer to a section of the NDAA.

The third explanation, offered by the amici supporting petitioners, is that the phrase "as provided in this section" just requires conformity with the procedural aspects of Section 1610, not the substantive protections of sovereign immunity. See Former

Officials' Am. Br. 23-25; Foundation Am. Br. 3-4.[11] The problem, again, is that Section 1610(g)(1) does not say that. It does not cross-refer to specific procedural provisions. It does not say "in accordance with the procedures specified in this provision" or anything of that kind. It simply provides that even when attachment and execution are authorized by Section 1610(g)(1), property is subject to attachment and execution only "as provided in this section." The amici suggest no reason to read that phrase more narrowly than it is written.

It is worth remembering, in this connection, that "this section"—Section 1610—is the critical provision of the FSIA, as far as execution immunity is concerned. The FSIA provides that the property of a foreign state "shall be immune from attachment arrest and execution" except as provided in Section 1610. Section 1610(g)(1) deals with making certain property subject to attachment and execution but contains no mention of immunity. When a provision like that refers to "this section," that reference should be taken at face value, not rewritten. The fact that neither petitioners, nor the Ninth Circuit, nor petitioners' supporting amici have been able to come up with a plausible explanation of that phrase that supports petitioners' interpretation of Section 1610(g)(1) is a further demonstration that that interpretation is mistaken.

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[11] "Former Officials' Am. Br." refers to the amicus curiae brief of the Former U.S. Counterterrorism Officials, National Security Officials, and National Security Scholars, in support of petitioners. "Foundation Am. Br." refers to the amicus curiae brief of the Foundation for Defense of Democracies in support of petitioners.

2. Petitioners also attempt to explain why, on their account, Sections 1610(a)(7) and 1610(b)(3) are not superfluous. As we have said, the problem is not just one of superfluity or redundancy but one of removing a sovereign immunity barrier that Congress deliberately left in place. In any event, though, petitioners' arguments do not succeed.

Petitioners' main argument is that Section 1610(a)(7) is not superfluous, on their interpretation of Section 1610(g)(1), because a party holding a judgment under the now-superseded Section 1605(a)(7) would be able to proceed under Section 1610(a)(7) but not under Section 1610(g)(1). But this is not an answer. The objection that a statute makes others superfluous cannot be answered by identifying some class of cases that can be brought under one but not under the other. The problem with an interpretation that renders a provision of a statute superfluous is that it raises the question whether that interpretation attributes an implausible statutory scheme to Congress. The fact that an interpretation causes an overlap among statutes to be only partial, not complete, does not answer the objection that that interpretation causes the statutory scheme to make no sense.

Petitioners' argument in this case is an example. Under Section 1610(a)(7), the holders of judgments under both Section 1605(a)(7) and 1605A may overcome the execution immunity that attaches to the property of a foreign state, as long as that property is used for a commercial activity in the United States. On petitioners' view, Section 1610(a)(7) is of no use to a party with a Section 1605A judgment—that party can proceed under Section 1610(g)(1), free of the

commercial activity limitation. On our view, Section 1610(a)(7) provides the way for both kinds of judgment holders to proceed, because Section 1610(g)(1) addresses a different issue.

Petitioners simply cannot explain why, if they are right, Congress would retain the reference to Section 1605A in Section 1610(a)(7). To say that Section 1610(a)(7) still serves *some* purpose is not an answer. If petitioners' view is correct, Congress's decision to leave the reference to Section 1605A in Section 1610(a)(7)—indeed, as we have said, to place that reference there when Section 1610(g)(1) was created—was simply irrational. On our account, Congress's actions make sense: Section 1610(a)(7) abrogates execution immunity, subject to the commercial activity limitation, for all terrorism-related judgments; Section 1610(g)(1) removes the *Bancec* barrier for those judgments (as long as they are converted to Section 1605A judgments) but says nothing about immunity. The problem with petitioners' view is, again, not just superfluity; it is that petitioners make the statutory scheme irrational.

Actually, petitioners' argument has an even greater problem. As we have noted, Section 1605A and Section 1610(g)(1) were adopted by the same statute, Section 1083(a) of the NDAA. Section 1083(a) added the reference to Section 1605A to Section 1610(a)(7)—something that is utterly inconsistent with petitioners' notion that Section 1610(a)(7) serves no purpose for holders of Section 1605A judgments. But in fact it gets even worse for petitioners. Section 1083(a) *repealed* the reference to Section 1605(a)(7) in Section 1610(a)(7). See Pub. L. No. 110-181, §1083(b)(3)(A), 122 Stat. 341;

Pet. Br. App. 44. After the NDAA was enacted—the statute that created Section 1610(g)(1)—Section 1610(a)(7) referred *only* to Section 1605A. So, according to petitioners' theory, when Congress enacted the NDAA it made a deliberate decision to make Section 1610(a)(7) completely pointless. It is hard to imagine a more convincing refutation of petitioners' theory about the relationship between Section 1610(g)(1) and Section 1610(a)(7)—or, as we have said, stronger support for our view that a party with a Section 1605A judgment who wants to take advantage of Section 1610(g)(1) must also meet the commercial activity requirement of Section 1610(a)(7).

In 2012, Congress, realizing that some holders of Section 1605(a)(7) judgments might not have converted them to Section 1605A judgments, added the reference to Section 1605(a)(7) back into Section 1610(a)(7). See Iran Threat Reduction and Syrian Human Rights Act of 2012, Pub. L. No. 112-158, §502(e), 126 Stat. 1214, 1260. That is what enables petitioners to assert that there is a less-than-complete overlap. But what petitioners cannot do is to ascribe any coherent logic to Congress's decisions. The reason those decisions make sense is that Section 1610(g)(1) does not abrogate sovereign immunity.

3. Finally, petitioners and their supporting amici assert that there are various aspects of Section 1610(g)(1) that are inconsistent with our view. They primarily focus on the reference to "the property of a foreign state against which a judgment is entered under section 1605A." They say (*e.g.*, Pet. Br. 38) that if the purpose of Section 1610(g)(1) was simply to

remove the *Bancec* limit, there would be no reason to refer to the property of the foreign state itself.

Section 1610(g)(1) refers to "the property of a foreign state against which a judgment is entered under section 1605A, and the property of an agency or instrumentality of such a state, including property that is a separate juridical entity or is an interest held directly or indirectly in a separate juridical entity." The function of Section 1610(g)(1) is to ensure that, when a Section 1605A judgment is entered against a foreign state, all three categories of property are "subject to attachment * * * and execution upon that judgment as provided in this section, regardless of" the *Bancec* factors. In Section 1610(g)(1), Congress made this point in terms: it listed the three categories of property and said that they are all "subject to attachment * * * as provided in this section."

Similarly, in view of the indefinite nature of the *Bancec* inquiry, Congress might have wanted to protect against any possibility that a foreign state's property would be held in a form that would allow a *Bancec*-based claim that the property was too remote from the state to be subject to attachment and execution. Such a claim might be made if, for example, the "property of the foreign state" were "an interest held * * * indirectly in a separate juridical entity" controlled by an unrelated party. The reference to the property of the foreign state in Section 1610(g)(1) forecloses the possibility of any such effort to use *Bancec* as a barrier to seizing assets. Of course, none of this suggests any abrogation of immunity in Section 1610(g)(1); the requirement that property is subject to the attachment

and execution "as provided in this section" applies to all of the categories of property listed in the provision.

The existence of a "foreign state against which a judgment is entered under Section 1605A" is, in any event, the predicate for the entire operation of Section 1610(g)(1). Even the most central *Bancec* issue—whether a judgment against a state makes instrumentalities' property "subject to attachment * * * and execution"—can arise only if there is such a judgment against "a foreign state." So Section 1610(g)(1) had to refer to the foreign state, not just to its instrumentalities. The reference to the state itself, and not just to its instrumentalities, far from being anomalous in the way petitioners suggest, is unavoidable, given the function of Section 1610(g)(1).

Finally, the reference in Section 1610(g)(1) to "the property of a foreign state against which a judgment is entered under section 1605A" may have been intended to broaden, even further, the property that would be "subject to attachment in aid of execution, and execution, upon that judgment as provided in this section." In particular, that reference might make it possible for a party holding a judgment under Section 1605A against one instrumentality of a foreign state to proceed against the property of a different instrumentality of that state, if there is an applicable abrogation of sovereign immunity. That is because Section 1603(a) of the FSIA defines the term "foreign state" to include "an agency or instrumentality of a foreign state" (28 U.S.C. § 1603(a)). The term "agency or instrumentality of a foreign state" then has its own definition, in Section 1603(b), which is incorporated by reference in Section 1603(a). So it is possible to read

Section 1610(g)(1) to say that "the property of a foreign state against which a judgment is entered under section 1605A" includes the property of any agencies or instrumentalities against which such a judgment has been entered. With the *Bancec* restrictions removed, a judgment against any of those entities might make the property of all of the agencies or instrumentalities of that state, and the property of the state itself, "subject to attachment in aid of execution, and execution, upon that judgment as provided in this section."

It is possible that a different phrasing of Section 1610(g)(1) could also have enabled Congress to accomplish all of these objectives—eliminating the *Bancec* barriers so that all the listed categories of property were subject to attachment and execution; making clear that any interest the foreign state has in property, however remote, is not subject to *Bancec* limitations; identifying a Section 1605A judgment against the state as the predicate for the elimination of those limitations; and, possibly, making the property of all instrumentalities and agencies subject to attachment and execution, "as provided in this section, regardless of" the *Bancec* limits, whenever a terrorism-related judgment was entered against any of them. But it remains the case that, as abundant evidence demonstrates, Section 1610(g)(1) is about *Bancec* and has nothing to do with sovereign immunity.

C. Petitioners' Interpretation Of Section 1610(g) Is Inconsistent With Fundamental Principles Of Foreign Sovereign Immunity

If petitioners' interpretation of Section 1610(g)(1) were accepted, parties with a judgment based on Section 1605A would be able to execute the judgment on property of a foreign state even if that property were not used for a commercial activity in the United States. As we have said, Congress has unquestionably provided a way for parties like petitioners, holding a terrorism-based judgment, to overcome the execution immunity more easily than other judgment creditors can. They can invoke Section 1610(a)(7), which means that they need not show, for example, any relationship between the property they seek to seize and the underlying claim. But they would still have to show that the property was used for a commercial activity in the United States. It is that requirement that petitioners want to use Section 1610(g)(1) to avoid.

The text and structure of the FSIA are an insuperable barrier to petitioners' claim. But petitioners' approach is also at odds with the deeply-rooted principle that a foreign state's execution immunity will be abrogated only in connection with commercial activity or commercial property, not in connection with noncommercial property like the Persepolis Collection. Nothing in the FSIA—and certainly nothing in Section 1610(g)(1)— "suggests Congress intended a radical departure from these principles" in this case (see *Bolivarian Republic of Venezuela v. Helmerich & Payne Int'l Drilling Co.*, 137 S. Ct. 1312, 1320 (2017)).

As we noted, and as the Court has explained, for much of our history United States courts, following the lead of Chief Justice Marshall in *The Schooner Exchange*, afforded an absolute immunity to foreign sovereigns. See *Verlinden*, 461 U.S. at 486. As far as execution immunity was concerned, that absolute barrier apparently persisted up until the enactment of the FSIA. See pp. 4-5 and note 2 *supra*, citing H.R. Rep. 94-1487, 94th Cong., 2nd Sess. 8, 27 (1976). The absolute immunity did give way, by the mid-twentieth century, to the "restrictive" view, which allowed foreign states to be sued and, under more limited conditions, eventually allowed the property of foreign states to be seized in satisfaction of judgments against them.

But the restrictive view drew a clear line between the commercial and the noncommercial affairs of foreign governments. Immunity could be abrogated, but only in "cases arising out of a foreign state's *strictly* commercial acts." *Verlinden*, 461 U.S. at 487 (emphasis added). The distinction between the commercial and noncommercial property of foreign states is, of course, central to the FSIA. The statute itself says that. 28 U.S.C. § 1602. The Court has said so. See, e.g., *Weltover, Inc.*, 504 U.S. at 614. The Tate Letter, on which the FSIA is based, makes that distinction. The logic behind this distinction, as the Court has recently explained, is that nations "acting in a commercial capacity" should be treated "like other commercial entities." See *Bolivarian Republic of Venezuela*, 137 S. Ct. at 1320. When a state is not acting in a commercial capacity, the immunity has generally remained intact.

Developments outside the United States reflect the same principle. The United Nations Convention on Jurisdictional Immunities of States and their Properties limits the availability of "post-judgment measures of constraint, such as attachment, arrest or execution, against property of a State" to—among other conditions not relevant here—circumstances in which "it has been established that the property is specifically in use or intended for use by the State for other than government noncommercial purposes" (Art. 19, sec. (c)). In a recent case that, like this one, involved property of cultural significance, the International Court of Justice ruled that "the seat of a cultural centre intended to promote cultural exchanges between Germany and Italy" was "being used for governmental purposes that are entirely noncommercial" and therefore could not be seized to satisfy a judgment. *Jurisdictional Immunities of the State (Germany* v. *Italy: Greece intervening), Judgment, I.C.J. Reports 2012*, p. 99 ¶ 119.

If petitioners' interpretation of Section 1610(g)(1) were to be accepted, the effect would be that parties with a judgment based on Section 1605A would be able to execute that judgment on property of a foreign state even if that property were not used for a commercial activity in the United States. As we have said, in Section 1610(a)(7), Congress provided an especially broad exception to execution immunity for parties like petitioners. But in providing the Section 1610(a)(7) route for parties holding terrorism-based judgments, Congress left in place the traditional limit on exceptions to immunity, especially execution immunity: the property of the foreign state must be property that is used for a commercial activity.

Congress is, of course, free to depart from these principles. In some instances, in legislating about issues related to terrorism, Congress has arguably done so. But such a departure would mark a sharp change in the law. The Court should not treat Congress as having made such a "radical departure" (*Bolivarian Republic of Venezuela,* 137 S. Ct. at 1320) unless it is clear that Congress did so. In this case, the opposite is true. Far from breaking with these principles, Congress made a specific decision that while parties like petitioners will receive, in many ways, a much clearer path to obtaining foreign states' property to satisfy their judgments, property like the Persepolis Collection will still be protected against execution by the fundamental norms of sovereign immunity.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

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